HAWLEY LAKE HOMEOWNERS' ASSOCIATION
v.
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 84-55-A Decided October 10, 1985

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) refusing to renew residential and recreational leases entered into between appellant's members and the White Mountain Apache Tribe.

Dismissed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Law and Order: Generally

   Neither the Board of Indian Appeals nor the Bureau of Indian Affairs has jurisdiction over issues that are entrusted to tribal courts.

2. Rules of Practice: Appeals: Standing to Appeal

   In order for an association to have standing to bring an appeal in its own right, it must show that the decision being appealed adversely affects its enjoyment of a legally protected interest.

3. Rules of Practice: Appeals: Standing to Appeal

   In order for an association to have standing to bring an appeal as a representative of its members, it must show that: (1) its members would have standing to sue in their own right, (2) the association's stated purposes make it a suitable proponent of its members' interests, and (3) the issues to be resolved do not require the individual participation of the members.

4. Indians: Leases and Permits: Generally

   Approval of an Indian lease by the Bureau of Indian Affairs does not constitute approval of documents not explicitly made part of the lease.

5. Indians: Law and Order: Generally

   The Bureau of Indian Affairs is not required to take action against an Indian tribe under 25 U.S.C. § 229 (1982) because of a property dispute with a non-Indian.

6. Indians: Lands: Tribal Lands--Indians: Reservations: Generally

Determination of the use of its own land is peculiarly the province of an Indian tribe.

7. Indians: Leases and Permits: Generally

The Bureau of Indian Affairs has no statutory or regulatory authority to take action against an Indian lessor for an alleged lease violation.

APPEARANCES: Alvin H. Shrago, Esq., Phoenix, Arizona, for appellant; Michael D. Cox, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee; Robert C. Brauchli, Esq., Whiteriver, Arizona, and Anthony Cohen, Esq., Santa Rosa, California, for the White Mountain Apache Tribe. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On September 27, 1984, the Board of Indian Appeals (Board) received a notice of appeal from the Hawley Lake Homeowners' Association (appellant). Appellant sought review of a July 27, 1984, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) upholding the refusal to renew residential and recreational leases entered into between appellant's members (lessees) and the White Mountain Apache Tribe, Whiteriver, Arizona (tribe, lessor). For the reasons discussed below, the Board dismisses this case in part for lack of jurisdiction and in part because appellant has failed to show it has standing to bring this appeal.

Background

Appellant states that it is comprised of over 300 persons who lease land held by the United States in Indian trust status for the White Mountain Apache Tribe in the vicinity of Hawley Lake, Arizona. None of appellant's members are individual parties to this appeal.

Starting in 1959, the tribe began leasing certain lands around Hawley Lake for residential and recreational purposes. In accordance with the provisions of 25 U.S.C. § 415 (1982), 1/ the leases were for a period of

1/ Unless indicated otherwise, all references to U.S.C. are to the 1982 edition.

Section 415(a) reads in pertinent part:

"Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of

25 years. None of the leases contained a renewal clause even though renewal for a second 25-year period is permitted by section 415. Between 1959 and 1976, 482 leases were approved, with annual rentals ranging from $40 to $120. An undisclosed number of these leases had no provision for periodic adjustments of the rentals. 2/ Although the oldest leases did not expire until 1984, some lessees sought permission to assign, sublease, or otherwise dispose of their leasehold interest before the expiration of the lease term. Rather than restricting the new lessees to the remaining term, the tribe allowed second leases under these circumstances for a new 25-year period. 3/

When it began the Hawley Lake development, the tribe prepared and distributed a general information sheet describing the project. This general information sheet was revised several times. In what appears to be the first such sheet, one paragraph indicates the intention at that time that renewals would be permitted, subject to tribal council approval. 4/

In 1969, at the request of appellant's Board of Directors, the tribal council considered whether a renewal option should be given to the lessees. Resolution No. 69-68, passed on June 4, 1969, authorized the tribal chairman to approve addenda to the existing Hawley Lake leases providing an option to renew for an additional 25-year term. The resolution also included provisions for periodic rental rate adjustments and for mandatory fire insurance on improvements on the leased property. These additional provisions had not

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fn. 1 (continued)
specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, * * * except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes * * * with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior." (Non-relevant provisions for the leasing of certain Indian trust lands for 99 years, and for specified findings required of the Secretary before approval of any lease or renewal are omitted.)

The Secretary has promulgated regulations implementing this section. In 1959 these regulations were found in 25 CFR Part 131. The regulations presently appear in 25 CFR Part 162.

2/ BIA regulations require that, except under unusual circumstances, any lease for more than 5 years contain a rental adjustment clause. See 25 CFR 131.6(e) (1958); 25 CFR 131.8 (1963); 25 CFR 162.8.

3/ Appellant incorrectly characterized these new leases as renewals.

4/ This general information sheet reads:

"6. Final regulations, specifications, terms and restrictions will be subject to approval by the Tribal Council. However, they will be generally as follows:

* * * * * * *

"b. Renewal and transfer of leases will be permitted, subject to the approval of the Tribal Council."

Other similar sheets do not contain the qualifying language in paragraph 6.

been sought by appellant. The record evidence is that appellant's then president objected to the fire insurance provisions of the resolution, and rejected the resolution without ever presenting it to the membership for their consideration. There is no dispute that the addendum permitted by the resolution was never included in any lease.

On December 13, 1977, the tribal council passed Resolution 77-248, which effectively rescinded Resolution No. 69-68 by prohibiting the issuance of homesite leases to non-tribal members. Apparently most of the existing Hawley Lake lessees were non-tribal members. Since 1977, the tribal council has refused to renew any lease.

Because the tribe refused to renew existing leases, appellant wrote to the Superintendent of the Fort Apache Agency, Bureau of Indian Affairs (BIA) (Superintendent) on March 5, 1984, demanding that the United States take action under 25 U.S.C. §§ 229 5/ and 415 and their implementing regulations, to protect the interests of the lessees by: (1) renewing the Hawley Lake leases; (2) filing suit against the tribe to permit a judicial resolution of the renewability of the leases, and allowing the lessees to remain on the land pending final resolution of the matter; or (3) obtaining compensation from the tribe for the fair market value of the lessees' improvements on the basis of an additional 25 years of use.

Appellant's letter was referred to the Phoenix Area Director (Area Director). On April 25, 1984, the Area Director held that 25 U.S.C. § 229 did not apply to this situation; no statute or regulation authorized or required the Secretary to force an Indian tribe to grant a lease renewal or extension, or to institute legal proceedings against an Indian tribe for the benefit of non-Indian lessees; and there was no right to renewal because the existing leases did not contain renewal provisions. The Area Director also noted that initial approval of the leases had required waiver of Departmental regulations. 6/ The Area Director concluded that no lease renewal rights existed.

5/ Section 229 states:

"If any Indian, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent or subagent, who, upon being furnished with the necessary documents and proofs, shall under the direction of the President, make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, such superintendent, agent, or subagent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury."

6/ Although the Area Director did not specify which regulation he meant, presumably it is the rental rate adjustment requirement mentioned in n.2, supra.

Appellant appealed this decision, stating on page 6 of its May 25, 1985, opening brief that: "A. The White Mountain Apache Tribe is taking the right of Hawley Lake lessees to have their leases renewed. B. The United States has a duty to ensure integrity, honesty and fairness in transactions between Indians and non-Indians, and it cannot permit either Indians or non-Indians to breach their promises." The Area Director and tribe each filed briefs in this appeal. On July 27, 1984, appellee affirmed the Area Director's decision.

Appellant's appeal to the Board was received on September 27, 1984. After briefing, the Board initially referred the case for an evidentiary hearing and recommended decision. See 13 IBIA 134 (1985). Both appellee and the tribe filed petitions for reconsideration of the referral order. Appellant responded to the petitions. After consideration of the materials filed, the Board recalled the case so that it could reexamine the administrative record. The Board held that it would issue a decision if it determined that the case could be resolved as a matter of law, but would return it to the Administrative Law Judge should a hearing still appear necessary. See 13 IBIA 197 (1985). By this decision, the Board finds that the matter should be disposed of on the present record.

Discussion and Conclusions

A. Jurisdiction

Although none of the briefs to the Board specifically challenge its jurisdiction, such a challenge is implicit in the tribe's and BIA's continual assertions that the proper forum for resolution of this matter is the White Mountain Apache tribal court. Because jurisdiction is a fundamental question going to the Board's right to hear this matter, it will be addressed. See Estate of James Wermy Pekah, 11 IBIA 237 (1983); Estate of Louis Harvey Quapaw, 4 IBIA 263, 82 I.D. 640 (1975).

[1] Appellant essentially seeks a determination that its members had a legal right to renewal of their leases. Two primary origins of this alleged legal right are cited: (1) the general information sheet distributed to an undisclosed number of lessees; and (2) Resolution No. 69-68. The same basic argument is raised as to each of these documents: a right to renewal was guaranteed, and that contractual property right has been taken. This argument involves a disagreement between the tribe and its lessees, and thus concerns matters properly resolved in tribal court in accordance with 25 U.S.C. § 1302(8). "Neither the Board nor the Department has review authority over matters entrusted to state, Federal, or tribal courts." Estate of Alice Mae Sasse, 12 IBIA 281, 286 (1984). See also Santa Clara Pueblo v. Martinez., 436 U.S. 49 (1978); Williams v. Lee 358 U.S. 217 (1959). 7/

7/ In Williams a non-Indian brought a contract dispute with an Indian to state court. The Supreme Court held at page 223:

"There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the

However, in order to avoid tribal jurisdiction, appellant challenges BIA rather than the tribe and argues that BIA approved the tribe's representation contained in the general information sheet that the leases would be renewed when it approved the individual leases; BIA is required by 25 U.S.C. § 229 to protect the property rights of non-Indians from Indians; BIA has a trust responsibility to protect the tribe's natural resource base; and BIA has a duty to ensure that Indians deal fairly with non-Indians. To the extent appellant limits its case to these arguments and to the extent these arguments are properly raised before it, the Board has jurisdiction in accordance with 43 CFR Part 4, to review BIA's actions and/or decisions effecting these matters.

B. Standing

Even though the Board has jurisdiction to review some of the issues raised by appellant, the tribe raises a second threshold question regarding appellant's standing to bring this appeal. The tribe notes (1) appellant is a leaseholder at Hawley Lake only to the extent of a three-year lease to a community building, the renewability of which is not at issue; (2) neither the identity, status, nor legal positions of appellant's membership is fully disclosed; 8/ (3) claims raised by appellant cannot be adequately addressed without identification of each leaseholder claiming relief and an analysis of that person's particular circumstances; and (4) only those leaseholders whose leases have or are about to expire have standing because they are the only persons who, even arguably, have lost any property interest.

The most comprehensive discussion of standing remains Warth v. Seldin, 422 U.S. 490, 498-502 (1975). Accordingly, the Supreme Court's review of standing requirements is most instructive:

> In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in

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fn. 7 (continued)
Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations."
(Citations omitted.)

This same restriction was applied to Federal courts in Santa Clara Pueblo, in which the Court repeated its recognition that tribal courts are appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."
436 U.S. at 65 (citation and footnote omitted).

8/ Although appellant states it has over 300 members, it does not name its members, tell whether these members are original lessees or assignees, or state the position of each of those members on the renewability question. Furthermore, only about three-fourths of the leases at Hawley Lake are included in appellant's claimed membership.

concern about the proper--and properly limited--role of the courts in a democratic society.

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action. . . ."

Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Without such limitations--closely related to Art. III concerns but essentially matters of judicial self-governance--the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing . . . ." Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the

legal rights of third parties. In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff. Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

One further preliminary matter requires discussion. For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed. [Footnotes and citations omitted italics in original.]

With regard to the standing of an association to bring suit on behalf of its members, the Court stated at page 511:

There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties. * * *

Even in the absence of injury to itself, an association may have standing solely as the representative of its members. The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. [Citations omitted.]

Although administrative review forums are not subject to the case-or-controversy restrictions established in Article III of the United States Constitution, they are bound by their authorizing regulations, which can impose the same type of restriction. Standing before this Board in administrative appeals is governed by 43 CFR 4.331, which states in pertinent part:

> Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations in a case involving a determination, finding, or order protested as a violation of a right or privilege of the appellant may appeal to the Board of Indian Appeals.

Section 4.331 is in turn based on 25 CFR 2.2, which provides that an appeal may be taken from an action or decision of a BIA official "where the action or decision is protested as a violation of a right or privilege of the appellant. Such rights or privileges must be based upon fundamental constitutional law, applicable Federal statutes, treaties, or upon Departmental regulations." "Right" is defined in 25 CFR 2.1(f) as "a favorable position in a legal relationship, the continued enjoyment of which may not be withdrawn save by a change in fundamental constitutional law." "Privilege" is defined in section 2.1(g) as "a favorable position in a legal relationship, the continued enjoyment of which may be withdrawn only upon a change in law, statute or regulations upon which the relationship is based."

[2] In Redfield v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 174, 175 (1982), the Board held that "[i]n order to have standing, appellant must show that the decision [being appealed] adversely affects his enjoyment of some legally protected interest. 25 CFR 2.1(f) and (g)." Thus, in the present case, appellant must show that the Area Director's and appellees' decisions adversely affected a legally protected interest of the association or such an interest of its members. As explained by the Supreme Court, a legal right is "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Tennessee Power Co. v. TVA, 306 U.S. 118, 137-38 (1939). Additionally, if it seeks to bring this case on behalf of its members, appellant must show that it is a proper representative.

Appellant has been on notice since at least June 27, 1984, the date of the Area Director's brief in appellant's appeal to appellee, that its standing to bring this case was being challenged. It has, however, declined to deal with this contention as a real issue. Instead, it has several times characterized the standing question as an "overly technical argument" and has failed to address any of the points raised or to provide additional information to prove that it has standing.

The record evidence shows that appellant is a voluntary association of lessees in the Hawley Lake project on the White Mountain Apache Reservation. By its own statement, not all lessees are members. Appellant has produced no evidence concerning the legal authority it may have to act on behalf of its members. In fact, the only evidence in the record concerning such authority is a statement contained in a letter to the editor, which apparently was published in the White Mountain Independent, from one of the

lessees stating that "[t]he Homeowners Association is not, and never has been, empowered to act as agent for any homeowner. Membership is voluntary and was never 100 percent." Furthermore, appellant has not attempted to show that any member supports the present appeal.

Because of its refusal to deal with the standing issue, appellant has not made even the most elementary showing that it is a legal "person." Under 25 CFR 2.1(a), a "'[p]erson' includes any Indian or non-Indian individual, corporation, tribe, or other organization." In the general legal sense, a "person" is an entity that is the subject of rights and duties. See Black's Law Dictionary, 1299-1300 (Rev. 4th ed. 1968). Appellant has not shown that it is any more than a loose, voluntary social association of natural persons, with no legal identity of its own. Specifically, appellant has not shown that its organizational documents, other written authorization from the members, or even state law, allows it to act as the members' agent or to sue and be sued on their behalf. However, for purposes of this discussion, the Board will assume that appellant is a legal person within the meaning of 25 CFR 2.1(a).

The first question in our analysis is whether appellant has standing to sue for itself. The only injury to itself that appellant claims is that its very existence is threatened because if the leases are not renewed, it will lose all of its membership. Appellant is a voluntary association of individuals with a life limited at most to the period of time during which its members hold valid leases to lands in the Hawley Lake project. Its continued existence is dependent upon the desire of some number of the lessees to remain in association, and would, therefore, not be guaranteed even if BIA were to take the action demanded.

Appellant's assertions that it will lose members if the leases are not extended is no more than a statement that it will cease to exist at the end of its natural duration. Appellant has not shown that any of the lessees whose leases have expired were members, or would have remained or become members if their leases had been extended. It has not shown that it has lost one member whose lease has not expired because of the tribe's refusal to renew leases. Furthermore, appellant has not shown that it has a right or privilege to have its duration extended, i.e., that the failure to extend its members' leases constitutes an invasion of its legal rights. The Board thus holds that appellant has not shown that it has standing to pursue this appeal on its own behalf. See National Collegiate Athletic Association v. Califano, 622 F.2d 1382 (9th Cir. 1980) (NCAA).

[3] In order for appellant to have standing to sue on behalf of its members, it must show that (1) its members would have standing to sue in their own right, (2) appellant's stated purposes as an association make it a suitable proponent of its members' interests, and (3) the issues to be resolved do not require the individual participation of the members. NCAA, supra; Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977). Each of these requirements must be met before an association has standing to represent its members.

Appellant asserts that its members had a legal right to a 25-year extension of their leases. If this contention, which alleges a violation

of contract and property rights, were raised by a lessee in the proper forum, the lessee would have standing. Appellant, therefore, has met the first requirement for it to have standing to represent its members.

The second question is whether appellant is a suitable representative of its members. This issue was discussed in NCAA at pages 1391-92:

> We hold that when an association does not have standing in its own right, and it is not clear which side of the lawsuit the association's members would agree with, one or more of the members must openly declare their support of the association stance, and they must do so through those officials authorized to bring suit on their behalf. Moreover, if more members of the association declare against the association's position than declare in favor of it, the association does not have standing, for then the parties in the lawsuit most likely would not be adverse. [Emphasis in original.]

Although appellant was on notice for over a year that both the Area Director and tribe believed that at least one member must be made part of this suit, it has refused to join a member or to give any indication of its members' attitudes toward the case. Because it is undisputed that many lessees, who may have been members of appellant, have donated their improvements to the tribe, moved those improvements off the reservation, or are making plans for such a move, it is not at all clear that all members, or even a majority, would agree with this suit. Furthermore, as discussed supra, there is no evidence that appellant has the authority to sue and be sued on behalf of its membership, and consequently, there is no proof that there are "officials authorized to bring suit on [the members'] behalf." The Board, therefore, holds that appellant is not a suitable representative of its members.

Because of this holding, which defeats appellant's standing to bring this case as a representative of its members, it is unnecessary to reach the final test, whether the individual participation of appellant's members is required for adequate resolution of the suit.

"It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Warth, supra at 518. Although appellant has had the opportunity for more than a year to make this threshold showing, it has steadfastly refused to do so. The Board thus finds that appellant has failed to show it has standing to bring this appeal, and need not be given an additional opportunity to prove standing at this time.

C. Argument

Had appellant shown standing, it nevertheless has failed to meet its burden of persuasion as to those issues over which the Board has jurisdiction.

Appellant first argues that the tribe's representations that the leases were renewable, contained in a general information sheet distributed to some

lessees and potential lessees, was part of all the leases approved by the Secretary. In support of this argument appellant cites general contract law relating to the integration of an agreement to the effect that when all parts of the agreement are not contained in the writing, parol evidence can be used to show the additional agreements. Appellant finds this law particularly appropriate here where there was no integration clause in the final written agreement. Appellant also states that in Black v. Evergreen Land Developers, Inc., 75 Wash. 2d 241, 450 P.2d 470 (1980), the Washington Supreme Court enforced promises that a land developer had made in a promotional brochure, but which were not set forth in the executed contract" (Opening Brief at 7).

Appellee and the tribe contend that because each lease is unambiguous on its face, parol evidence may not be admitted to contradict the clear words of the agreement. They furthermore argue that BIA did not approve the general information sheet, and silence in regard to that sheet cannot be held to constitute approval.

The general information sheet cited by appellant states in pertinent part: "6. Final regulations, specifications, terms and restrictions will be subject to the approval of the Tribal Council. However, they will be generally as follows: * * * b. Renewal and transfer of leases will be permitted, subject to the approval of the Tribal Council."

Because this document is written in terms indicating that the rules governing the Hawley Lake project were not yet finalized, it was probably the first informational brochure prepared by the tribe. Other informational sheets that are part of the record are written without the qualification that future Tribal Council approval is required and contain no reference to lease renewability.

Assuming arguendo that the tribe's representation, which is limited by the clear statement that Tribal Council approval would be required for any renewal or transfer if the Tribal Council initially approved the concept of renewals and transfers, is the kind of unambiguous and definite agreement between two parties that is required for the formation of a contract, BIA did not approve this or any other representation made in the general information sheet. Initially, a finding that BIA approval of a lease incorporated without reference the general information sheet would also require a finding that the terms of each lease varied depending upon which general information sheet each lessee saw. Thus, in order to determine the terms of each lease, each lessee would have to be questioned in order to determine which general information sheet he or she saw.

The Board finds Black, supra, inapposite to the present dispute. In Black, the court found as a question of fact that the land developer had consistently represented to the plaintiffs that their view would never be impaired. This promise was only tangentially contained in the development's informational brochure, which was mentioned only once in the court's opinion. Instead, the court found controlling the actual statements made by the agents of the developer, the use of a crossbar to determine the acceptable height of a roof on an adjoining lot, and the written communications between the plaintiffs and the developer showing and acknowledging a specific covenant

that plaintiffs' view would not be obstructed in any way. There is no comparable evidence of active representations, definite promises, and unmistakable reliance in this case.

[4] The leases at issue here were written and approved under 25 U.S.C. § 415 (see n.1 infra). This statute provides that leases and renewals may be issued "with the approval of the Secretary of the Interior." Since 1961, the regulations have explicitly provided that "[a]ll leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval." 25 CFR 131.5(a) (1963); 25 CFR 162.5(a). The wording of prior regulations shows that they also anticipated the Secretary's written approval. In order to find that the Secretary had approved the representations made in each general information sheet, the Board would have to find that he violated his own regulations by failing to include all of the terms of the agreement in the written lease.

The Board finds that BIA approval of individual leases did not constitute approval of the representations made in the general information sheet cited by appellant, or any other information sheet. BIA approval of the leases constituted approval only of the terms of the individual lease as set forth within the four corners of that document. Cf., Lawrence v. United States, 381 F.2d 989 (9th Cir. 1967).

[5] The next argument over which the Board would have jurisdiction, is that BIA was required to take action under 25 U.S.C. § 229 to protect the property rights of appellant's members. Section 229 is clearly addressed to depradations of individuals or groups of marauding Indians. Furthermore, as held in Jaeger v. United States, 33 Ct. Cl. 214 (1898), there must be a showing of malicious intent or gross negligence in order to proceed under this section. Appellant has shown neither depradations by an individual or group of marauding Indians nor malicious intent or gross negligence. Therefore, BIA had no duty to proceed against the tribe under section 229. Instead, BIA had a duty to refrain from imposing itself in a contract dispute between the tribe and appellant's members that should be submitted to tribal court for resolution. See Santa Clara Pueblo, supra; Williams v. Lee, supra.

[6] The Board also would have jurisdiction to determine whether BIA violated its trust responsibility to the tribe by allowing it to take actions not in its best interest. Appellant appears inordinately solicitous about the appropriateness of the tribe's determination as to how the Hawley Lake area should be used. Federal policy in respect to tribal land is to allow the tribe to determine the uses to which that land will be committed. It is not BIA's responsibility to force a tribe to put its land to the highest economic use, or to any use whatsoever. Determination of the use of its own land is peculiarly the province of the tribe involved. See, e.g., Williams, supra.

[7] Finally, appellant alleges that BIA has a duty to ensure that Indians deal fairly with non-Indians in commercial transactions. This argument shows a basic misunderstanding of BIA's role in such situations. The BIA is the agency of the Federal Government primarily responsible for ensuring that the Federal trust responsibility to Indians is carried out. As such, it approves, on behalf of the Secretary, all documents relating to

conveyances of Indian trust property or of interests in such property. The purpose of this approval is to ensure that Indians are not improvident in dealings touching their trust property and are not taken advantage of in such transactions. See, e.g., 25 U.S.C. § 415. The extent of BIA's policing of Indian leases is to ensure that the lessees, whether Indian or non-Indian, fulfill their contractual obligations. See 25 CFR 162.14. Although BIA may attempt to advise individual Indians and tribes concerning proper conduct as lessors, it has no statutory or regulatory authority to take action against an Indian lessor. Such actions must be brought in the appropriate tribal or Federal court.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed in part for lack of jurisdiction and in part because of appellant's failure to prove standing.

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Jerry Muskrat
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE PARRETTE CONCURRING IN THE RESULT:

Although I remain dissatisfied with the manner in which this appeal was handled by the Board procedurally, 1/ the decision by the majority to consider the case on its merits on the basis of the present record must be respected. Under the circumstances, I concur in the result reached by Judge Muskrat.

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Bernard V. Parrette
Chief Administrative Judge

1/ See the Board's order dated July 17, 1985, 13 IBIA 197, and my dissent at page 198.